RECORD AND BRIEFS

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In the Supreme Court of the United States

BANK OF AMERICA CORP., ET AL., PETITIONERS,

v.

CITY OF MIAMI, FLORIDA

WELLS FARGO & CO. AND
WELLS FARGO BANK, N.A., PETITIONERS,

v.

CITY OF MIAMI, FLORIDA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.[1]

The Property Casualty Insurers Association of America promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of nearly 1,000 member companies, representing the broadest cross-section of insurers of any national trade

[1] No counsel for a party authored this brief in whole or in part, and no one other than the amici, their members, or their counsel contributed any money intended to fund the preparation or submission of this brief. All parties in both cases have consented to the filing of this brief.

association. PCI members write $202 billion in annual premiums and write a substantial proportion of the nation's commercial and personal insurance policies: 35% of the nation's property casualty insurance, 42% of the automobile insurance market, 27% of the homeowners market, 33% of the commercial property and liability market, and 34% of the private workers' compensation market.

The Chamber and PCI have a substantial interest in these cases, which threaten to undermine the impact of the Fair Housing Act on residential lending markets, significantly expand the universe of potential claimants under the Fair Housing Act beyond those that the Act is intended to protect, dramatically increase litigation, and potentially impose unforeseen consequences on various other aspects of the U.S. business environment. Many of the Chamber's members participate directly in retail lending markets, various Chamber and PCI members have historically been called upon to defend actions asserted under the Fair Housing Act, and all of their respective members are engaged in domestic business activities that are directly affected by the U.S. legal system. As a result, the Chamber has direct insights into the adverse effects that affirming the decisions below would have on mortgage markets and on the ability of lenders to provide the funding essential to fuel urban growth and development in historically underserved communities, and Chamber and PCI members have interests in and insight on the impact that this Court's rulings on matters of statutory standing have on myriad facets of the U.S. business environment. The Chamber and PCI respectfully submit that their views on the implications of these cases shed light on the legal and policy questions presented here.

SUMMARY OF ARGUMENT

The Eleventh Circuit dealt with two issues under the Fair Housing Act: the statute's "zone of interests" and proximate causation. The Eleventh Circuit's resolution of each of those issues not only contravenes this Court's precedents but also threatens to undermine the very purposes of the Fair Housing Act by discouraging socially valuable lending to underserved communities by imposing outsized legal risks on such activities.

A. The decisions below are counterproductive in their effects on the availability and pricing of credit. By extending Fair Housing Act remedies to municipalities that have allegedly suffered remote economic harms—such as a purported diminution of their tax base—the Eleventh Circuit has exposed lending institutions, and potentially many other business entities, to virtually boundless liability, with no limiting principle apparent to provide even a modicum of predictability or proportionality. Under the Eleventh Circuit's re-interpretation of the statute, it would appear that essentially *any* entity or individual who can claim indirect injury by prohibited conduct may sue. The universe of proper plaintiffs would not be limited to municipalities, but presumably could include any others who might, in some attenuated sense, be considered foreseeable "victims" of discrimination.

Interpreting the FHA to provide a remedy to those who are not discriminated against and whose injuries do not arise from the *race*-based aspect of the defendant's conduct untethers the Act's remedies from its core purposes. Expanding the scope of potential liability so drastically is unnecessary for deterrence purposes in light of robust enforcement of the Act by

both multiple federal agencies and private victims of discrimination, and the damages, civil penalties, and equitable relief they may obtain. In any event, any marginal gain in deterrence is outweighed by the potential harm that affirming the Eleventh Circuit's ruling will cause to the purposes of the FHA and other statutory regimes designed to expand lending in historically underserved communities. In particular, the decisions below threaten to deter legitimate, socially desirable lending activities by imposing legal risks that discourage such lending.

B. The Eleventh Circuit's ruling also conflicts directly with this Court's recent precedents. In two decisions in the past five years, the Court has made clear that Congress is presumed to legislate against a background understanding that a plaintiff may only invoke a statutory cause of action if it meets two criteria: it falls within the "zone of interests" the statute protects and the defendant's wrongdoing proximately caused its injuries. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Thompson* v. *N. Am. Stainless, LP*, 562 U.S. 170 (2011). Those decisions limited overbroad language in certain older decisions—which the Eleventh Circuit treated as still binding—that could be read out of context to suggest that the FHA's private cause of action extends to any individual who can claim injury, no matter how remote from the allegedly discriminatory act.

ARGUMENT

The decisions below allow any individual or entity to bring a Fair Housing Act discrimination suit if it can plausibly allege that it has suffered any foreseeable economic injury as a result of a defendant's conduct—even an injury far remote from the alleged ra-

cially discriminatory act at issue. That extraordinary result not only conflicts with this Court's precedents, but also threatens adverse real-world consequences for residential lending markets and for the broader economy. Failing to correct the Eleventh Circuit's expansive decisions could disrupt lending markets in low-income and traditionally underserved communities, effectively undermining the purposes of the Fair Housing Act. A barrage of litigation from a voluminous roster of new plaintiffs—many seeking simply to force settlements in cases of dubious merit—will generate significant disincentives to legitimate, socially desirable lending activities in disadvantaged communities and potentially discourage other business activities in these communities.

A. Affirming The Decisions Below Would Produce Policy Consequences Contrary To The Purposes Of The Fair Housing Act.

1. The Eleventh Circuit's decisions expose lenders accused of violating the FHA to effectively limitless liability. The effect of that expansion in liability is predictable: for entirely understandable reasons, lenders are likely to make major, societally undesirable adjustments in their lending practices. Subject only to a vague foreseeability requirement, the decisions below hold that the FHA's cause of action extends to the outer boundaries of Article III. Pet. App. 19a, 38a.[2] The remoteness of the foreseeability standard is illustrated by the multi-link causal theory here. The City of Miami alleges that defendants made

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[2] Unless otherwise noted, citations are to the petition appendix in *Bank of America*, as the Eleventh Circuit's opinion in that case contains the fullest explanation of its reasoning. Pet. App. 2a n.1.

predatory loans disproportionately to minority borrowers, who in turn defaulted in greater than expected numbers, which in turn led to increased foreclosures, which in turn decreased the value of surrounding properties, which in turn reduced the City's tax base and necessitated additional municipal services expenditures at vacant, foreclosed properties. *Id.* at 3a, 10a.

The ease of constructing and pleading that sort of causal chain has not gone unnoticed by local government authorities seeking to shore up their finances. Since the financial crisis, a host of large municipalities has filed suits alleging theories akin to those at issue here, with many filing simultaneously against multiple lenders.[3] The Eleventh Circuit's decisions have only encouraged this litigation. Oakland, California and Cobb, DeKalb, and Fulton Counties in Georgia filed suit shortly after the Eleventh Circuit's decisions

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[3] See, e.g., *Societal Liability for Predatory Lending*, 49-6 Banker's Letter of the Law 2 (June 1, 2015); *Cobb Cty.* v. *Bank of Am. Corp.*, No. 15 Civ. 4081, Dkt. No. 1, ¶ 582 (N.D. Ga.) (complaint brought by three counties seeking "hundreds of millions of dollars" in compensatory damages). Plaintiffs in such suits include Baltimore, Maryland; Birmingham, Alabama; Cobb County, Georgia; Cook County, Illinois; DeKalb County, Georgia; Fulton County, Georgia; Memphis, Tennessee; Miami, Florida; Miami Gardens, Florida; Los Angeles, California; the Los Angeles Unified School District, California; Oakland, California; Providence, Rhode Island; and Shelby County, Alabama. See Bank of America Corp. Pet. Br. 7 n.2; Nicholas S. Agnello, *Cities Are Looking to Fair Housing Act to Fight Redlining*, Law360 (Nov. 5, 2015), http://www.law360.com/articles/723243/cities-are-looking-to-fair-housing-act-to-fightredlining; Dena Aubin, *Oakland Lawsuit Accuses Wells Fargo of Mortgage Discrimination*, Reuters (Sept. 22, 2015), http://www.reuters.com/article/us-wellsfargo-discrimination-idUSKCN0RM28L20150922.

were handed down. See *City of Oakland* v. *Wells Fargo Bank, N.A.*, No. 15 Civ. 4321 (N.D. Cal. filed Sept. 21, 2015); *Cobb Cty., et al.* v. *Bank of Am. Corp., et al.*, No. 15 Civ. 4081 (N.D. Ga. filed Nov. 20, 2015).

Even when the merits of such a suit are insubstantial, the costs to defendants are not. Defendants face intense pressure to settle so as to avoid the major legal and reputational burdens inherent in defending themselves against inevitably high-profile litigation alleging discriminatory conduct. It is a timeworn truth that rather than expending substantial resources in litigation, defendants regularly settle suits of dubious merit based purely on economic and practical reality. And, of course, the prospect of such settlements will encourage both suits by municipalities and other governmental units and changes in lending practices in historically underserved communities.

2. The expansiveness of the Eleventh Circuit's approach is by no means limited to government authorities. When an alleged victim of housing discrimination is foreclosed upon, a host of people and entities may claim to have suffered some sort of harm: owners of neighboring properties, who experience a decline in property value; the handyman who once made money doing odd jobs at the now-empty house; local social service organizations, which face increased demands; school districts, which face declining enrollment and corresponding budget cuts; local teachers and municipal employees, whose services are in reduced demand; and on and on, *ad infinitum*. Under the Eleventh Circuit's ruling, all these parties—who have never been discriminated against—nonetheless have a claim for *housing discrimination*. In *Thompson*, this Court described an analogous result as "absurd," citing the example of "a shareholder [who]

would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence." 562 U.S. at 176-177 (reasoning that "absurd consequences would follow" if the Court expanded the ability to sue under Title VII to the limits of Article III).

The Eleventh Circuit's extreme interpretation is not necessary to serve the FHA's purposes. Permitting municipalities to recover from lenders for purely economic harm benefits only lawyers and municipal budgets—not the victims of the alleged discrimination. Importantly, the allegedly racially discriminatory character of the challenged conduct is irrelevant to the City's alleged injury: it does not matter to the City *why* the foreclosures occurred. The City's harm stems simply from the mere fact of the foreclosures. Identical harm would have befallen the City had the foreclosures occurred as a result of the housing market collapse, high unemployment, profligate borrowers, poorly underwritten loans, decline of local industry, or any other race-neutral cause.

In this respect, the facts of these cases bear no relationship to the facts of the cases upon which the City (and the Eleventh Circuit's opinion) relies. In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 208 (1972), for example, plaintiffs were tenants of a segregated housing complex who alleged that they had been deprived of the benefits of living in a racially integrated community. As this Court there observed, plaintiffs' injuries fell within the FHA's ambit because everyone "in the same housing unit"—prospective and current residents alike—had been "injured by racial discrimination in the management of those facilities." *Id.* at 212. Later cases, unlike this

one, similarly involved plaintiffs who had suffered some sort of *race-based* injury at the hands of the defendants. See *Thompson*, 562 U.S. at 176 (stating that the holdings in cases following *Trafficante* were consistent with a "zone of interests" limitation, even if they did not explicitly adopt one).

3. In light of the extensive government enforcement regime in place under the FHA, as well as litigation by actual victims of discrimination, it is doubtful that the Eleventh Circuit's broad interpretation of the FHA's cause of action is necessary to create a further deterrent to discrimination. The Department of Justice, the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, and the federal bank regulatory agencies all engage in aggressive and effective enforcement efforts relating to the FHA.[4] And HUD just last year announced an aggressive new rule designed to ensure communities that receive federal funding meet their obligations under the FHA. See generally *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2015).

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[4] See *United States* v. *BancorpSouth Bank*, No. 1:16-cv-00118, Dkt. No. 8 (N.D. Miss. July 25, 2016) (consent order submitting for the court's approval a tentative settlement of allegations by the Department of Justice and Consumer Financial Protection Bureau that the defendant engaged in redlining in violation of the Fair Housing Act); *Recent Accomplishments of the Housing and Civil Enforcement Section*, U.S. Dep't of Justice (Aug. 4, 2016), https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section; U.S. Dep't of Hous. & Urban Dev., *Annual Report on Fair Housing: FY 2012-2013*, at 1 (Nov. 7, 2014) (noting that in 2012 and 2013, HUD and related agencies "obtained over $425 million in compensation for victims of housing discrimination").

The combination of these government enforcement actions (including civil penalties, costs, attorneys' fees, and appropriate equitable relief) and private remedies afforded to plaintiffs actually within the FHA's zone of interests (including compensatory and punitive damages, costs, attorneys' fees, and appropriate equitable relief) are fully sufficient to deter lending activity that is illegal under the Act. See 42 U.S.C. §§ 3612(g); 3613(c); 3614(d) (2012). In addition, these government authorities and private plaintiffs are empowered to challenge not only lending practices motivated by intentional discrimination, but also those that result in a disparate impact on minorities. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522, 2524 (2015). The breadth of substantive liability under the Act counsels strongly against an extraordinary expansion of the FHA's zone of interests to encompass all manner of conceivable plaintiffs.

4. Crucially, any incremental deterrence value of the Eleventh Circuit's approach is far outweighed by the harm it threatens to cause to lending markets in underserved communities. Well-functioning lending markets are critical for urban development and for poverty reduction more broadly. See, *e.g.*, Thorsten Beck, *et al.*, *Finance, Inequality and the Poor*, 12 J. Econ. Growth 27 (2007) (finding that financial development not only boosts aggregate growth, but also disproportionately helps the poor). Needless to say, financial institutions will be reluctant to engage in activities that pose unpredictable legal risks that exceed potential commercial gain. Cf. Ian McKendry, *Banks Face No-Win Scenario on AML 'De-Risking'*, American Banker (Nov. 17, 2014), http://www.american

banker.com/news/law-regulation/banks-face-no-win-scenario-on-aml-de-risking-1071271-1.html.

Lending markets cannot thrive if their providers are threatened with burdensome litigation and expansive liability to a vast array of plaintiffs based on an attenuated chain of causation. Common sense suggests that lenders may respond to the burden imposed by the Eleventh Circuit by offering fewer loan products designed to benefit lower-income individuals, thus reducing the credit options available to these borrowers. This Court has recognized as much: "If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system." *Inclusive Cmtys.*, 135 S. Ct. at 2524. The Eleventh Circuit's decisions wholly ignore this critical factor. They set the dial to maximum legal risk without addressing whether doing so is unnecessary and likely counterproductive because it threatens to restrict the availability of credit where it is most vital.

B. The Decisions Below Are Contrary To This Court's Recent Precedents.

1. The Eleventh Circuit's rulings conflict with two recent, unanimous opinions of this Court. In *Thompson* v. *North American Stainless, LP*, 562 U.S. 170 (2011), the Court addressed the right to sue under Title VII, which, like the FHA, provides a cause of action to any "aggrieved" person. The Court expressly rejected expansive language from earlier FHA cases, including *Trafficante*, which had suggested that Title VII's cause of action extends to the very edges of Article III. It said such language was "ill-considered"

"dictum" and "decline[d] to follow it." *Id.* at 176. As the Court put it, embracing the dictum of the earlier cases would lead to "absurd consequences," such as suits brought by plaintiffs who had only remote or indirect economic injuries. *Id.* at 176-178. Those very words are equally applicable here.

The *Thompson* Court proceeded to hold that the use of "aggrieved" in Title VII incorporates a "zone of interests" test, which enables suit by "any plaintiff with an interest arguably sought to be protected by the statute, while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Id.* at 178 (internal quotation marks, citation, and alteration omitted). Under this test, a plaintiff generally lacks standing if its injury represents mere "collateral damage" of the "unlawful act." *Ibid.*

Then in *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Court established even more fundamental rules, identifying two background principles against which Congress is presumed to legislate absent an affirmative indication to the contrary. The first is the "zone-of-interests" test articulated in *Thompson*. *Id.* at 1388. The second pertains to causation: when Congress creates a cause of action, it is presumed to incorporate the common-law requirement of proximate cause. *Id.* at 1390. This requirement ensures that a plaintiff's harm is not "too remote from the defendant's unlawful conduct." *Ibid.* (internal quotation marks omitted). Accordingly, proximate cause is generally absent "if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Ibid.* (quoting *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268-269 (1992)). This "venerable princi-

ple reflects the reality that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Ibid.* (quoting *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519 (1983)).

2. The decisions below violate the principles of *Thompson* and *Lexmark* in two ways. First, they eschew the zone-of-interests test on the basis of overbroad language in *Trafficante* and its progeny. Those decisions do not extend as far as the Eleventh Circuit believed. Indeed, this Court in *Thompson* expressly noted that *Trafficante* had limited its holding to "tenants of the same housing unit." 562 U.S. at 176 (quoting 409 U.S. at 209). Reading *Trafficante* more broadly would bring it into direct conflict with *Thompson* and *Lexmark*. Cf. *Grupo Dataflux* v. *Atlas Glob., Grp. LP*, 541 U.S. 567, 571 n.3 (2004) (noting that earlier "cases can easily be harmonized"). By declining to heed these more recent precedents, the Eleventh Circuit effectively treated the FHA as *sui generis*, immune from the standard rules of statutory interpretation that apply to other federal statutes.

Second, the decisions below impermissibly dilute the proximate-cause element to a mere "foreseeability" requirement. As *Lexmark* makes clear, the hallmark of proximate cause is a "sufficiently close connection" between the alleged injury and "the conduct the statute prohibits." 134 S. Ct. at 1390. Addressing that rule in the context of the Lanham Act, the *Lexmark* Court held that "while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's inability to

meet its financial obligations." *Id.* at 1391 (internal quotation marks and alteration omitted). The municipalities here are precisely analogous to *Lexmark*'s list of entities that may *not* sue, and the Eleventh Circuit erred in permitting claims to proceed that even it admitted were based on an attenuated causal chain composed of "several links" and riddled with "confounding variables." Pet. App. 18a, 39a.

* * *

This Court should stem the rising tide of municipal suits by making clear that the standard requirements for remedial federal statutes—that a plaintiff's claim fall within the zone of interests protected by Congress and that it satisfy the directness requirement of proximate cause—apply with equal force to the FHA. Diluting those requirements would only disserve those the Act is most meant to help, by pressuring financial institutions to change their lending practices in historically underserved communities so as to avoid undue legal risk. That result would be at odds with the Court's precedents and sensible housing policy.

CONCLUSION

For the reasons set forth above, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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